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No. 88-6873

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Chandler Clemons,

Petitioner,

v.

The State of Mississippi,

Respondent.

On Writ of Certiorari to the
Supreme Court of Mississippi

BRIEF AMICUS CURIAE OF THE MISSISSIPPI CAPITAL DEFENSE RESOURCE CENTER, INC.

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August 18, 1989

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BRIEF AMICUS CURIAE OF THE MISSISSIPPI CAPITAL DEFENSE RESOURCE CENTER, INC.

INTEREST OF AMICUS

Amicus The Mississippi Capital Defense Resource Center, Inc. was created by the Mississippi State Bar Association for the purpose of assisting counsel in the representation of indigent death-sentenced prisoners. The primary goal of the Resource Center is to improve defense representation in capital cases by offering expert support, legal guidance and technical assistance to court-appointed or volunteer counsel. The Resource Center provides such assistance to attorneys at all stages of the capital sentencing and appellate process, from trial through federal habeas corpus review. The Resource Center legal staff also serves directly as counsel of record in twelve capital cases now pending in the Mississippi state and federal courts. The Mississippi Capital Defense Resource Center accordingly has a substantial

interest in this case, which concerns the operation of Mississippi's death penalty statute.[1/]

INTRODUCTION

This case presents two narrow but important questions of Eighth Amendment law: first, whether the invalidity of Mississippi's "especially heinous, atrocious and cruel" statutory aggravating circumstance renders Mr. Clemons' sentence unconstitutional because the jury that sentenced him was explicitly instructed to weigh this invalid circumstance, along with one other, against all mitigating considerations; and second, whether Mr. Clemons' case must be remanded for a new sentencing proceeding to ensure a reliable, individualized assessment of his

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1/ The parties have consented to the submission of this brief. Their letters of consent are being filed with the Clerk of this Court.

personal culpability and moral guilt. As will be demonstrated, under Mississippi's tightly circumscribed capital sentencing procedure, the jury's reliance on the invalid consideration precluded the possibility of a reliable "reasoned moral response" to Mr. Clemons' character and the circumstances of his crime. See Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)). Mississippi's capital sentencing procedure precludes the State Supreme Court from rectifying the deficiency and rendering a constitutionally reliable sentence. Accordingly, the judgment of the Mississippi Supreme Court must be reversed.

Mr. Clemons was convicted of capital murder for the role he played in the robbery and killing of a pizza delivery person. Clemons v. Mississippi, 535 So.

2d 1354 (Miss. 1988). The State's case rested primarily on testimony from a codefendant who had entered into a plea bargain. At the sentencing phase of Mr. Clemons' trial, the jury was instructed to:

> [c]onsider only the following elements, if any, of aggravation in determining whether the death penalty should be imposed:
>
> (1) the capital offense was committed while the defendant was engaged in the commission of robbery and was committed for pecuniary gain;
>
> (2) the capital offense was especially heinous, atrocious or cruel.

See Joint Appendix (J.A.) (emphasis added). The jury was also specifically instructed not to consider any aggravating circumstances, statutory or nonstatutory, beyond these two. And the jury was instructed fourteen times to weigh the statutory aggravating circumstances against all mitigating evidence and

arguments in determining whether death was the appropriate sentence. Id.

These instructions conform precisely to the dictates of Mississippi's capital sentencing statute, which strictly limits and directs the capital sentencer's discretion. Miss. Code Ann. § 99-19-101 (Supp. 1987). The statute states that (i) the sentencing jury "shall be limited to" consideration of statutory aggravating factors, id. at 99-19-101(5), and (ii) a death sentence may be imposed only when the jury finds beyond a reasonable doubt that mitigating considerations do not "outweigh the aggravating circumstances," id. at 99-19-101(3)(c) (emphasis added). Thus, in Mr. Clemons' case as in every capital case in Mississippi, statutory aggravating circumstances play a determinative role not only in narrowing the class of eligible defendants but also in guiding the sentencer's ultimate decision

whether the defendant should receive a death sentence based on "the character of the individual and the circumstances of the crime." See Zant v. Stephens, 462 U.S. 862, 879 (1983) (emphasis added).

In Mr. Clemons' case, the prosecution made the "especially heinous, atrocious and cruel" aggravating circumstance the centerpiece of its sentencing phase argument for death -- to the virtual exclusion of the other statutory factor at issue. But the prosecution's argument included almost no effort to identify the additional characteristics that might permit the conclusion that Mr. Clemons' crime was more "heinous, atrocious or cruel" than murder generally. Instead, exploiting the intractable ambiguity of this statutory language, see Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the prosecutor urged the jury to view the murder under consideration as especially

heinous because the victim was so worthy an individual, and because the loss would be keenly felt by his parents. See Gathers v. South Carolina, 109 S. Ct. 2207 (1989) (holding victim impact arguments unconstitutional). The jury received no limiting instructions as to the scope of the "especially, heinous, atrocious and cruel" language. After deliberation, the jury found both this aggravating circumstance, and the other one charged, and imposed a sentence of death.

On direct appeal, the Mississippi Supreme Court affirmed the sentence of death, notwithstanding this Court's ruling in Maynard v. Cartwright. Although Mississippi's "especially heinous, atrocious and cruel" aggravating circumstance is identical to the Oklahoma aggravating circumstance invalidated in Maynard, the Mississippi Supreme Court advanced two reasons for declining to follow Maynard.

First, Mississippi's "especially heinous, atrocious and cruel aggravating circumstance" had been given a consistent limiting construction. Second, under Zant v. Stephens the invalidity of this circumstance had no consequence because the sentencer found another, valid statutory aggravating circumstance. 535 So. 2d at 1363.

The Mississippi Supreme Court's opinion does not, however, attempt to demonstrate that the purported narrowing construction of "especially heinous, atrocious or cruel" has been applied consistently. Nor does the opinion explain how Zant v. Stephens could control, notwithstanding the crucial differences between the Georgia capital sentencing procedure at issue in Zant and Mississippi's weighing procedure for determining capital sentences. Nor is there any foundation for the court's passing

suggestion that any error involved was harmless -- which is unsupportable in light of the fact that the prosecutor relied almost exclusively on the invalid consideration in closing argument. The court made no effort to identify the mitigating considerations weighed by the jury, or to explain why no reasonable juror could have found that these mitigating considerations outweighed the single remaining valid aggravating circumstance. In short, the Mississippi Supreme Court rubber-stamped the verdict of death, without any responsible analysis of the grave issues before it.

This Court granted certiorari on June 19, 1989. 109 S. Ct. 3184 (1989).

SUMMARY OF ARGUMENT

This Court's recent decision in Maynard v. Cartwright squarely governs Mr. Clemons' case. His death sentence must be

overturned because none of the grounds on which the Mississippi Supreme Court sought to distinguish Maynard withstands scrutiny.

Mississippi's especially heinous, atrocious and cruel aggravating circumstance violates the Eighth Amendment for the same reasons the identically worded Oklahoma provision was struck down in Maynard. The jury that sentenced Mr. Clemons was given no limiting instructions as to the meaning of the statutory language, and the Mississippi Supreme Court has not supplied a consistent limiting construction. To the contrary, this invalid aggravating circumstance has been applied lawlessly in Mississippi. (Point I).

The invalidity of this statutory aggravating circumstance requires invalidation of Mr. Clemons' sentence because statutory aggravating factors play a

determinative role in the ultimate selection stage of Mississippi's tightly circumscribed capital sentencing procedure. For this reason, the present case is not governed by Zant v. Stephens, but by Maynard. (Point II).

This finding of invalidity entitles Mr. Clemons to a new sentencing before a jury because under Mississippi's capital sentencing procedures an appellate court is institutionally incapable of rendering the "reasoned moral response" that the Eighth Amendment requires. (Point III).

ARGUMENT

I. THIS COURT'S RECENT DECISION IN MAYNARD V. CARTWRIGHT MANDATES THE CONCLUSION THAT MISSISSIPPI'S "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL" STATUTORY AGGRAVATING CIRCUMSTANCE VIOLATES THE EIGHTH AMENDMENT.

The statutory aggravating circumstance of "especially heinous, atrocious or cruel" murder, set forth in Mississippi's capital punishment statute, Miss.

Code Ann. 99-19-101, is identical -- word for word -- to the Oklahoma statutory provision struck down in Maynard v. Cartwright. The charge to Mr. Clemons' sentencing jury, which recited this unconstitutional language without any limiting gloss, thus presented exactly the same risk of unreliable capital sentencing identified by this Court in Maynard. Because "an ordinary person could believe that every unjustified, intentional taking of a human life is 'especially heinous,'" 108 S. Ct. at 1859, the charge did not provide Mr. Clemons' jury with any meaningful guidance as to whether his murder should be considered especially blameworthy. See Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980). Standing alone, the vague, encompassing language of this statutory aggravating circumstance did not "reasonably justify the imposition of a more severe sentence on the defendant

compared to others found guilty of murder." Zant v. Stephens, 462 U.S. at 877. The jury was thus left with unfettered discretion in assessing the blameworthiness of Mr. Clemons' conduct; its interpretation of the statutory language "can only be the subject of sheer speculation." Godfrey, 446 U.S. at 429.

Mississippi's experience with the "especially heinous" instruction vividly confirms the concerns that led this Court to invalidate the identical provision in Maynard. As of August 1 of this year, in cases tried subsequent to the effective date of Miss. Code Ann. § 99-19-101 (1977), the State had instructed the jury to consider the especially heinous aggravating circumstance in sixty-eight cases of the seventy-one cases in which the jury

recommended the death penalty.[2/] In only one of these sixty-eight cases did the State provide the jury with any sort of limiting instruction. See Woodward v. State, 533 So. 2d, 418, 434 (Miss. 1988), cert. denied, 109 S. Ct. 1767 (1989).[3/] And out of these sixty-eight cases, the jury found the crime to be "especially

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2/ See Appendix A, Sections 1 and 2.

3/ The limiting instruction given in Woodward, moreover, did nothing to limit and direct the sentencer's discretion. The trial court instructed the jury that "in considering whether the capital offense was especially heinous, atrocious or cruel; heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means assigned [sic] to inflict a high degree of pain with indifference, to or even enjoyment of, the suffering of others." (Tr. 2110.)

At trial, during the charge conference, Woodward objected to the instruction which allowed the jury to consider as an aggravating circumstance that the capital murder "was especially heinous, atrocious or cruel." The ground articulated for the objection was that there was not sufficient evidence to justify the instrucion, a reference to the fact that the victim died instantly. (Tr. 1079.)

heinous" in sixty-four. See Appendix A, Section 1.

Consideration of the heinous aggravating circumstance did not guide the jury's discretion in these sixty-four cases; instead, the "especially heinous" instruction plainly induced sentencing juries to call virtually all murders "especially heinous." Twenty-nine of the cases -- nearly half of the total -- involved murder by gunshot wounds where death occurred instantly or within a few minutes. 4/ These twenty-nine cases did not involve physical or emotional torture, serial murder, or other facts that set the murders apart from the capital murders that have been found not to warrant the death penalty in Mississippi. None of

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4/ Those 29 cases are found in Appendix A, Section 1, markd with an asterisk.

these murders was qualitatively more "heinous" than any murder.

This abject failure to guide the sentencing jury has not been remedied by a consistent limiting construction of the Mississippi Supreme Court. Far from "consistent," the Mississippi Supreme Court's construction and application of the "especially heinous, atrocious and cruel" statutory factor is utterly lawless.

In Coleman v. State, 378 So. 2d 640 (Miss. 1979), the Mississippi Supreme Court purported to establish a limiting construction to the phrase "especially heinous, atrocious or cruel," holding that to be so characterized a murder had to be "conscienceless or pitiless" and "unnecessarily torturous to the victim." See id. at 648. But this construction has never been applied subsequently by the Court. To the contrary, the Mississippi Supreme

Court has rarely even made mention of this construction.

In most cases challenging the "especially heinous" instruction, the Mississippi Supreme Court has made no analysis of the propriety of the aggravating circumstance at all, beyond stating summarily that all the aggravating circumstances were warranted. See, e.g., Culberson v. State, 379 So. 2d 499, 508-509 (Miss. 1979), cert. denied, 449 U.S. 986 (1980), Cole v. State, 525 So. 2d 365, 374 (Miss. 1987), cert. denied, 109 S. Ct. 330 (1988). In other cases, the Court assumed arguendo that the aggravating circumstance was improper, but affirmed the sentence on the ground that other aggravating circumstances were present. See, e.g., Stringer v. State, 500 So. 2d 928, 944 (Miss. 1986); Tokman v. State, 435 So. 2d 664, 670 (Miss. 1983), cert. denied, 467 U.S. 1256 (1984).

In still other cases, the court merely compounded its earlier error, by stating that "heinousness" had been found in similar cases in the past, without ever considering whether those earlier cases could be justified in light of the court's purported limiting construction. See, e.g., Johnson v. State, 416 So. 2d 383, 393 (Miss. 1982); Lockett v. State, 517 So. 2d 1317, 1335 (Miss. 1984), cert. denied, 108 S. Ct. 2858 (1988); Irving v. State, 361 So. 2d 1360 (Miss. 1978).

In the very few cases where the Mississippi Supreme Court has purported to apply a limiting construction, it has found the "especially heinous" aggravating circumstance present where the facts did not warrant the finding. For example, notwithstanding the fact that the victim was unconscious instantly and died within five minutes of being shot, the court in Edwards v. State, 441 So. 2d 84 (Miss.

1983), held that the jury could find that the crime was "torturous" and "pitiless."

Far from limiting a broad jury construction of "especially heinous," the reality is that the Mississippi Supreme Court has never since 1979 in a reported case "found the facts insufficient to support [the jury's finding of] the especially heinous aggravating circumstance." Johnson v. Thigpen, 806 F.2d 1243, 1247 (5th Cir. 1986), cert. denied, 480 U.S. 951 (1987). As that court concluded, "the limiting construction . . . appears now to be more honored in breach than observance." Id. at 1246-1247. This practice has continued unabated since 1986. For example, in Woodward v. State, the Mississippi Supreme Court approved a limiting instruction that bore no resemblance to one set forth in Coleman. See note 3 supra (setting forth instruction).

In sum, the Mississippi Supreme Court's practice with regard to the especially heinous aggravating circumstance has been virtually identical to the practice in Oklahoma struck down by this Court in Maynard. Indeed, several months after the decision in Clemons, the Mississippi Supreme Court conceded that the "especially heinous, atrocious and cruel" statutory aggravating circumstance is unconstitutional as applied in Mississippi. In Johnson v. Mississippi, the Mississippi Supreme Court acknowledged -- in an opinion after remand from this Court -- that the "especially heinous, atrocious and cruel" aggravating circumstance "should not have been submitted to the sentencing jury." 538 So. 2d 329 (1989). The court made no effort to suggest that the statutory factor could be saved on the ground that it had received a consistent limiting construction. Instead the court

made clear that the sentencing jury's reliance on this factor amounted to constitutional error, and remanded for a new sentencing proceeding. See also Pinkney v. Mississippi, 538 So. 2d 329 (1989).

Accordingly -- as the State of Mississippi now admits -- the sentencer's reliance on the "especially heinous, atrocious or cruel" statutory aggravating circumstance in Mr. Clemons' case violated the Eighth Amendment principles set forth in Maynard v. Cartwright.

II. THE JURY'S IMPROPER RELIANCE ON THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" STATUTORY AGGRAVATING CIRCUMSTANCE VIOLATES THE EIGHTH AMENDMENT BECAUSE THIS FACTOR PLAYED A DETERMINATIVE ROLE IN ULTIMATE DECISION TO SENTENCE MR. CLEMONS TO DEATH UNDER MISSISSIPPI'S NARROWLY CIRCUMSCRIBED CAPITAL SENTENCING PROCEDURE.

The sentencer's erroneous reliance in Mr. Clemons' case on the "especially heinous, atrocious or cruel" statutory aggravating circumstance violates the

Eighth Amendment and requires a redetermination of the appropriate sentence.

This Court's decision in Maynard v. Cartwright makes that much clear. In Maynard, the Court held that the sentencer's reliance on the "especially heinous, atrocious or cruel" aggravating circumstance violated the Eighth Amendment notwithstanding that the jury had found another, valid statutory aggravating circumstance in that case. 108 S. Ct. at 1856. Obviously, the mere existence of another valid statutory aggravating circumstance did not suffice to render inconsequential the invalidity of the "especially heinous" aggravating circumstance. Rather, the invalidity of the "especially heinous" factor had federal constitutional significance and required resentencing. Because Mississippi's capital sentencing procedure is indistinguishable from the one at issue Maynard in

all relevant respects, resentencing is required here as well.

For purposes of Eighth Amendment analysis, the consequence of finding a statutory aggravating circumstance invalid in a particular capital case "depends on the function of the jury's finding of an aggravating circumstance under [the State's] capital sentencing statute, and on the reasons that the aggravating circumstance at issue . . . was found to be invalid." Zant v. Stephens, 462 U.S. at 864. Under Mississippi law, statutory aggravating circumstances play a determinative role both by "circumscrib[ing] the class of persons eligible," and by guiding the jury's ultimate "individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant, 462 U.S. at 878-879 (emphasis added).

A. The Role of Statutory Aggravating Circumstances Under Mississippi Law. In every capital case under Mississippi's capital sentencing procedure, the sentencing jury is instructed that it may impose death only if (i) it finds at least one statutory aggravating circumstance, and (ii) the applicable statutory aggravating circumstances are not outweighed by mitigating considerations. Thus, the substantive aggravating criteria set forth in the Mississippi statute serve not only a narrowing function but also, and most importantly, a crucial function of guiding and informing the jury's ultimate decision. The sole aggravating factors that the jury may consider in undertaking its statutorily-mandated weighing process are the statutory aggravating criteria set forth in section 99-19-101.

Mississippi adopted this tightly circumscribed weighing approach to capital

sentencing "to ensure reliability in the determination that death is the appropriate punishment in a given case." Cf. Penry v. Lynaugh, 109 S. Ct. at 2951 (quoting Woodson v. North Carolina, 428 U.S. at 305 (opinion of Stewart, White, and Stevens, JJ.). The limitation upon jury consideration of aggravating circumstances keeps the "sentencing authority . . . focus[ed] on the particularized circumstances of the crime." See Gregg v. Georgia, 428 U.S. 153, 199 (1976) (opinion of Stewart, White and Stevens, JJ.). The requirement that the jury consider all relevant mitigating considerations, and explicitly weigh those considerations against the statutory aggravating circumstances found to be present, ensures that the sentencing process conforms with this Court's specific holdings in Penry and Lockett v. Ohio, 438 U.S. 586 (1978).

Under Mississippi's capital sentencing procedures, the sentencing jury's "reasoned moral response to the defendant's background, character and crime" occurs in the crucible of this tightly confined weighing process. See Penry, 109 S. Ct. at 2947 (quotations omitted). The integrity of the jury's weighing process at the ultimate selection stage is thus crucial to the Eighth Amendment "reliability" of the sentencing judgment. Because statutory aggravating circumstances determine the results of this weighing process, the jury's reliance on an invalid statutory aggravating factor is devastating to the integrity of the sentencing judgment.

The invalid "especially heinous, atrocious and cruel" statutory aggravating factor at issue in Mr. Clemons' case creates a particular risk of skewing the careful, balancing judgment of the capital

sentencer. The prosecutor urged this factor as the primary reason why Mr. Clemons was particularly blameworthy and therefore deserving of a death sentence. The intractable ambiguity of the invalid language permitted the jury to reach the unguided and arbitrary conclusion that the murder before it was particularly blameworthy in comparison with murder generally, and to rely on that conclusion as a primary reason for sentencing Mr. Clemons to death. Indeed, the jury could reasonably have assumed that its assessment of the particular blameworthiness of Mr. Clemons' did no more than implement the moral judgments of "the State . . . representing organized society," as reflected in the statutory language of Section 99-19-101. Gregg, 428 U.S. at 192. In short, the sentencing jury reached the conclusion that the circumstances of Mr. Clemons' crime were

especially blameworthy without any basis for that conclusion -- other than the prosecutor's wholly improper invocation of the worthiness of the victim and the impact of his death.

This risk fatally undermines the reliability of the sentencer's "reasoned moral response." See Penry, 109 S. Ct. at 2949. As this Court has repeatedly made clear, that "moral response" in capital sentencing decisions must encompass not only the defendant's background and character but also "the circumstances of the crime." Zant, 462 U.S. at 879; Penry, 109 S. Ct. at 2948. In this case, the invalid aggravating circumstances involved an assessment of the moral blameworthiness of the "circumstances of the crime," and was in all likelihood determinative of the jury's ultimate individualized judgment under

Mississippi's limited balancing procedure. It was one of only two aggravating factors found by the jury and weighed against all mitigating considerations. The invalidity of this determinative factor renders the sentencing process fundamentally unreliable. Mr. Clemons' sentence of death therefore violates the core requirements of the Eighth Amendment.

B. The Error in this Case is not "harmless" under the reasoning of Zant v. Stephens or Lowenfield v. Phelps. In Zant v. Stephens this Court held that the invalidity of one statutory aggravating circumstance did not so undermine the reliability of the sentence rendered under Georgia's capital sentencing procedures as to violate the Eighth Amendment. The key to the decision, as the Court stressed repeatedly, was the limited narrowing function of the statutory aggravating circumstances: in Georgia, "the

aggravating circumstance merely performs the function of narrowing the category of persons convicted of murder who are eligible for the death penalty." 462 U.S. at 875. The narrowing function had been adequately performed in Zant notwithstanding the invalidity of one of the three statutory aggravating factors because the other two aggravating circumstances found by the jury were valid. At the ultimate selection stage, the sentencer did not rely on statutory criteria in rendering the "individualized determination" of the appropriate sentence. To the contrary, the sentencer was to consider literally countless factors in rendering the ultimate judgment, and did not weigh statutory aggravating criteria against mitigating considerations. See id. at 893-894 (Rehnquist, J., concurring in the judgment).

In Georgia, a finding of more than one aggravating circumstance is wholly superfluous; so long as one circumstance is properly found, errors concerning the other circumstances are truly harmless. In Mississippi, however, as discussed above, aggravating circumstances play a crucial role they do not have under Georgia law. They determine sentencing outcomes in that they are the sole aggravating factors weighed against mitigating circumstances in the jury's final judgment. A Mississippi jury's consideration of an invalid aggravating circumstance simply cannot be considered "harmless" in the same way that consideration of a superfluous invalid aggravating circumstance was found to be harmless in Zant.

Neither does Lowenfield v. Phelps, 108 S.Ct. 546 (1988), lend support to Mississippi's confused application of Zant to this case. In Lowenfield this Court

upheld a Louisiana capital sentence which had been challenged on the ground that the aggravating circumstance upon which the jury relied repeated an element of the capital offense, and so did not adequately narrow the class of death-eligible murderers. The Court held that such repetition was of no constitutional significance. It made no difference whether that narrowing was done in the definition of capital murder or in the consideration of aggravating circumstances.

Lowenfield differs from this case in two crucial respects. First, under Louisiana's statute the jury was not asked to weigh statutory aggravating circumstances against mitigating circumstances. See Lowenfield, supra at 549. Thus statutory aggravating circumstances did not play the same crucial role in determining the jury's ultimate individualized assessment of moral culpability under Louisiana

law as they do under Mississippi law. Second, unlike this case, Lowenfield the jury did not consider an improper factor that infected its ultimate judgment and so rendered its sentence unreliable. Lowenfield involved consideration of a completely legitimate factor -- that the defendant knowingly created a risk of death or great bodily harm to more than one person. The only relevant claim made in Lowenfield was that this double consideration of this factor resulted in a failure of the statute properly to narrow the class of death-eligible murderers. In the present case, in contrast, the sentencer's ultimate judgment was skewed by reliance on an improper consideration.[5/]

5/ The Fifth Circuit's suggestion in Johnson v. Thigpen, 806 F.2d 1243, 1248-1249 (5th Cir. 1986), (Footnote Continued)

Perhaps in recognition of the important differences between this case and Lowenfield, the Mississippi Supreme Court has never attempted to justify affirmance of a death sentence by relying on Lowenfield.

C. Harmless Error. The Mississippi Supreme Court's passing assertion that any error in this case was harmless is wholly unsupportable. To be sure, in the appropriate case an appellate court may identify error in capital sentencing and nevertheless affirm the conviction on the ground that the error was harmless.

(Footnote Continued)
cert, denied, 480 U.S. 951 (1987), that any error in Mississippi's aggravating circumstance would be of no constitutional significance because the class of death eligible murders is already limited by Mississippi's capital murder category is equally misguided. Establishing a capital murder category may satisfy the constitutional requirement that the class of death eligible murderers be narrowed; it does not render harmless errors that infect the guidance provided the jury and so render unreliable the jury's sentence.

Satterwhite v. Texas, 486 U.S. 249 (1988). It may do so, however, only if it certain "beyond a reasonable doubt that that the error complained of did not contribute to the verdict obtained." See Chapman v. California, 386 U.S. 18 (1967). The question whether the error identified is in fact harmless under that standard is a federal question for this Court. Id. at 21.

Reviewing the record in this case, it is impossible to conclude beyond a reasonable doubt that the jury would have voted the death sentence absent the "especially heinous" instruction and the grossly improper argument about that instruction made by the prosecutor. There were only two aggravating circumstances, and the prosecutor made the "especially heinous, atrocious and cruel" circumstance the centerpiece of his closing to the jury.

This case is very much like Chapman v. California. In Chapman this Court declined to find a consitutional error harmless, on the ground that the improper consideration was the central focus of the prosecutor's remarks to the jury. 386 U.S. at 24-26. Indeed the Mississippi Supreme Court itself generally "eschew[s] 'harmless error' in [its] reasoning" when "the district attorney argued [the invalid] aggravating circumstance as a reason to impose the death penalty." Johnson v. State, 511 So. 2d 1333, 1338 (Miss. 1987), rev'd on other grounds, Johnson v. Mississippi, 108 S. Ct. 1981 (1988). In reversing the court's decision in that case, this Court explicitly affirmed Mississippi's harmless error holding, stating that:

> It is . . . apparent that the use of [the invalid aggravating circumstance] in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight

> in connection with its assigned task of balancing aggravating and mitigating circumstances 'one against the other.'

108 S. Ct. at 1987.

Additionally the case in mitigation was strong. Compare Barclay v. Florida, 463 U.S. 939, 944 (1983) (no evidence in mitigation). The jury heard evidence about, inter alia, Mr. Clemons' youth, his lack of any prior criminal record, his remorse, his difficulties with drug abuse and addiction, and his organic brain damage. It is not possible to say with any certainty that, had the jury not been misguided by the improper consideration of the "especially heinous, atrocious and cruel" nature of the murder, it would still have tipped the balance in favor of the capital sentence. In any event, no such judgment was made by the Mississippi Supreme Court here. Its cursory harmless error discussion did not even mention any

of the mitigating evidence or the effect that evidence had on the jury.

III. THE CONSTITUTION REQUIRES THAT ONLY A NEW FINDER OF FACT MAY REIMPOSE A DEATH SENTENCE AFTER A PRIOR SENTENCE HAS BEEN VACATED AS A RESULT OF THE TYPE OF ERROR PRESENT IN THIS CASE.

For the foregoing reasons, in this case the jury's finding that the crime was "especially heinous, atrocious and cruel," the infected the jury's ultimate "reasoned moral response" to Mr. Clemons' character and the circumstances of his crime. The Constitution therefore requires that this sentence be vacated.

If Mississippi seeks to reimpose the death sentence, its subsequent procedures must of course also meet Constitutional requirements as well as the requirements of Mississippi law. For the reasons set forth below, the Eighth and Fourteenth Amendments require that any new death sentencing by Mississippi be imposed by a newly constituted sentencing jury.

Accordingly, to the extent that the Mississippi Supreme Court believed that it was entitled to reweigh the evidence and reimpose the death sentence in this case, its decision must be reversed.

A. It Would Violate the Eighth Amendment Were The Mississippi Supreme Court To Resentence Petitioner To Death Without Remanding The Case Back To The Trial Court For Jury Resentencing.

At the heart of this Court's Eighth Amendment capital sentencing jurisprudence is the requirement that sentencing procedures scrupulously assure an individualized determination that the punishment is precisely "tailored to [the defendant's] personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. at 782, 801. And this Court has recognized that only the finder of fact is in a position to make this individualized determination:

> [A]n appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the

> appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind."

Caldwell v. Mississippi, 472 U.S. 320, 330 (1985).[6/]

The Mississippi Supreme Court has no way of calculating how a Mississippi jury would have balanced the evidence before it had its discretion been guided in a constitutionally proper manner here.[7/]

6/ To the extent dicta in this Court's per curiam opinion in Wainwright v. Goode, 464 U.S. 78, 86 (1983), suggests that appellate courts may engage in this sort of balancing, that dicta does not appear to have survived Caldwell.

7/ Indeed, it would be virtually impossible under the Mississippi sentencing scheme as a practical matter for the appellate court to make this determination. Under Mississippi law, the

(Footnote Continued)

More to the point, that Court is in no position itself to engage in the sensitive balancing of competing considerations necessary to effectuate a valid death sentence. It has not seen or heard the defendant, those who testified on his behalf, or those who accused him. The Constitution requires that the sensitive and awesome responsibility of determining whether the defendant must die for his crime rests with the finder of fact who has had the benefit of observing the

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(Footnote Continued)
capital sentencing jury does not state which if any mitigating circumstances it found present. As a result, an appellate court reviewing that sentence has no way of determining which mitigating circumstances the jury credited, or the weight it gave to the mitigating circumstances. There is no way, given the manner in which Mississippi's statute operates for an appellate court, to know which factors to balance. Therefore, under Mississippi law the appellate court lacks the information necessary to engaging in the weighing process mandated by Mississippi law (and, in one form or another, required by the United States constitution).

constitutionally-mandated sentencing process.

That is not to say that any constitutional error in a jury's sentencing consideration will automatically require resentencing by the fact-finder. To begin, as discussed above, if an appellate court fairly determines that an error was harmless, it need not vacate the sentence in the first instance, and thus would not need to reconsider the appropriateness of the death sentence.

Moreover, as this Court made clear in Cabana v. Bullock, 474 U.S. 376 (1986), there are certain types of jury errors in capital sentencing that do not require resentencing by a new fact-finder. In that case the trial judge erred in instructing the jury how to make the objective finding required by Enmund v. Florida, 458 U.S. 782 (1982), that the defendant either killed, attempted to

kill, or intended that a killing take place or that lethal force be used. The federal habeas court for that reason vacated the death sentence. This Court reversed and remanded. If the state appellate court had made the finding required by Enmund, this Court held, that is sufficient for federal constitutional purposes, whatever errors may have been committed during the jury consideration of that issue. Id. at 385-86.

In Cabana this Court held that the Enmund finding may be made at any time during the State's review of the sentence, because it is an objective, categorical finding that may fairly be based upon a review of the trial transcript. Crucially, this Court distinguished the Enmund finding in this regard from the determination at issue here -- the ultimate decision to sentence to death:

> The determination whether the death sentence is permissible under Enmund is different in significant respect . . . from the general exercise of sentencing discretion. . . . The latter . . . determinatio[n] typically involve[s] case-by-case, totality-of-the-circumstances decision-making. Enmund, by contrast imposes a categorical rule.

474 U.S. at 386. Here, where the error involved goes to the heart of the fact-finder's individualized sentencing determination, if the state wishes to reimpose a death sentence, it must remand the case for resentencing through a fact-finding process unspoiled by harmful constitutional error.

B. It Would Violate the Fourteenth Amendment Were The Mississippi Supreme Court To Resentence Petitioner To Death Without Remanding The Case Back To The Trial Court For Jury Resentencing.

Federal law. Even if the Eighth Amendment did not in all cases mandate that only the finder of fact has the authority to impose a death sentence --

which it does -- the Fourteenth Amendment in any event would require jury resentencing in this case. "Where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement." Cabana v. Bullock, 474 U.S. 376, 387 n.4 (1986). Thus in Hicks v. Oklahoma, 447 U.S. 343 (1980), this Court vacated a 40 year sentence affirmed by the State appellate court even though the jury had based the sentence in part upon a recidivist statute the appellate court subsequently struck down as unconstitutional. The appellate court declined to upset the sentence because it determined that such a sentence was appropriate even without consideration of the invalid recidivist statute. This Court reversed, for reasons that are dispositive here:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. at 346 (citations omitted).

Here, as set forth below, Mississippi law requires that only a sentencing jury may impose a death sentence; accordingly it would violate the federal due process clause were the State in this case to allow its appellate court to make that determination.

Mississippi Law. The Mississippi legislature has determined that the "jury is to determine punishment in capital cases in a separate sentencing proceeding." Miss. Code Ann. § 99-19-101(1)

(emphasis added). Absent such a jury determination, "the court shall impose a sentence of life imprisonment." Id. at § 99-19-101(3). In particular, the plain words of the Mississippi statute require the jury to "unanimously find in writing . . . that there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." Id. at § 99-19-101(3), (3) (c). As the Mississippi Supreme Court has emphasized, "under our law the jury is the sole player in the judicial process who may vote to send an accused to die." Wiley v. State, 449 So. 2d 756, 762 (Miss. 1984), cert. denied, 479 U.S. 906 (1986). "[T]he entire sentencing burden [is] on the jury," and "the jury's verdict at the sentencing phase is the single most important stage of the process of determining whether the defendant will live or die." Williams v.

State, 445 So. 2d 798, 811 (Miss. 1984), cert. denied, 469 U.S. 1117 (1985).

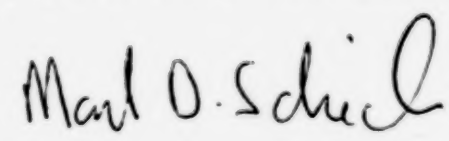
Accordingly, when an error has been made by the sentencing jury in a capital case which requires that the jury's verdict be vacated as untrustworthy, the Mississippi Supreme Court has held consistently that only a new jury has the statutory authority to reimpose a capital sentence. See Johnson v. State, No. DP-43 (July 18, 1989), 1989 WL 82333; Stringer v. State, 500 So. 2d 928, 946 (Miss. 1986); Pinkney v. State, 481 So. 2d 306 (Miss. 1985); Mhoon v. State, 464 So. 2d 77 (Miss. 1985); Wiley, supra; Williams, supra; Cannaday v. State, 455 So. 2d 713 (Miss. 1984), cert. denied, 469 U.S. 1221 (1985) (finding that error "so infected the sentence phase that reversal of that phase must be ordered"); Edwards v. State, 441 So. 2d 84 (Miss. 1983). Mississippi's failure to follow its own sound procedure

in this case would violate petitioner's federal right to due process of the law.

CONCLUSION

For the foregoing reasons the judgment of the Mississippi Supreme Court imposing the death sentence upon petitioner Chandler Clemons should be reversed, and the Mississippi Supreme Court should be instructed that a death sentence may not be reimposed unless the cause is first remanded to the trial court for a new sentencing proceeding.

Respectfully submitted,



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APPENDIX A

CAPITAL CASES TRIED SUBSEQUENTLY TO THE EFFECTIVE DATE OF MISS. CODE ANN. § 99-19-101 (1977), AND REVIEWED BY THE MISSISSIPPI SUPREME COURT WHEREIN THE JURY RETURNED A SENTENCE OF DEATH

1. Cases where the jury found the "especially heinous, atrocious, or cruel" aggravating circumstance:

Billiot v. State, 454 So. 2d 445, 466 (Miss. 1984)

*Booker v. State, 449 So. 2d 209, 220-21 (Miss. 1984)

Bullock v. State, 525 So. 2d 764, 774 (Miss. 1987)

Cabello v. State, 471 So. 2d 332, 349 (Miss. 1985)

*Caldwell v. State, 443 So. 2d 806, 814 (Miss. 1983)

*Cannaday v. State, 455 So. 2d 713 (Miss. 1984)

*Clemons v. State, 535 So. 2d 1354, 1361-62 (Miss. 1988)

Cole v. State, 525 So. 2d 365, 374 (Miss. 1987)

*Culberson v. State, 379 So. 2d 499, 508-09 (Miss. 1979)

Gregory Davis v. State, No. DP-86, (Miss. July 26, 1989)

*Danny Ray Davis v. State, 512 So. 2d 1291, 1292 (Miss. 1987)

Dufour v. State, 453 So. 2d 337, 347 (Miss. 1984)

Dycus v. State, 440 So. 2d 246 (Miss. 1983)

*Hezekiah Edwards v. State, 441 So. 2d 84, 90-92 (Miss. 1983)

*Evans v. State, 422 So. 2d 737, 745-746 (Miss. 1982)

Faraga v. State, 514 So. 2d 295, 309 (Miss. 1987)

Fisher v. State, 481 So. 2d 203, 211 (Miss. 1985)

Fuselier v. State, 468 So. 2d 45 (Miss. 1985)

*Gillard v. State, 428 So. 2d 576, 586 (Miss. 1983)

David Gray v. State, 472 So. 2d 409 (Miss. 1985)

Jimmy Lee Gray v. State, 375 So. 2d 994, 1003-04 (Miss. 1979)

*Hill v. State, 432 So. 2d 427, 443 (Miss. 1983)

Houston v. State, 531 So. 2d 598 (Miss. 1988)

*Irving v. State, 441 So. 2d 846, 849 (Miss. 1983)

*Edward Earl Johnson v. State, 416 So. 2d 383, 393 (Miss. 1982)

Leon Johnson v. State, 476 So. 2d 1195 (Miss. 1985)

Samuel Bice Johnson v. State, 511 So. 2d 1333, 1337 (Miss. 1987)

*Gregory Jones v. State, 461 So. 2d 686 (Miss. 1984)

Larry Jones v. State, 464 So. 2d 983, 994-95 (Miss. 1980)

*Jordan v. State, 464 So. 2d 475, 478 (Miss. 1985)

King v. State, 421 So. 2d 1009, 1018 (Miss. 1982)

*Johnny Rufus Lanier v. State, 533 So. 2d 473, 476, 491 (Miss. 1988)

Alfred Leatherwood v. State, No. DP-70 (Miss. July 19, 1989)

Michael Leatherwood v. State, 435 So. 2d 645, 648 (Miss. 1983)

*Lockett v. State, 517 So. 2d 1317, 1335 (Miss. 1987)

*Lockett v. State, 517 So. 2d 1346 (Miss. 1987)

*Mhoon v. State, 464 So. 2d 77,84 (Miss. 1985)

Minnick v. State, No. DP-79, slip op. at 35-36 (Miss. December 14, 1988)

*Moffett v. State, 456 So. 2d 714 (Miss. 1984)

Neal v. State, 451 So. 2d 743, 763 (Miss. 1984)

*Nixon v. State, 533 So. 2d 1078, 1084 (Miss. 1987)

Pinkney v. State, 538 So. 2d 329, 357 (Miss. 1988)

Pruett v. Thigpen, 655 F. Supp. 1254, 1273 (N.D. Miss. 1986); Pruett v. State, 431 So. 2d 1101 (Miss. 1983)

Reddix v. State, 381 So. 2d 999, 1013 (Miss. 1980)

*Grady Smith v. State, 499 So. 2d 750 (Miss. 1986)

Willie Albert Smith v. State, 419 So. 2d 563, 568 (Miss. 1982)

*James R. Stringer v. State, 454 So. 2d 468, 479 (Miss. 1984)

Jimmy Michael Stringer v. State, 500 So. 2d 928, 944 (Miss. 1986)

Tokman v. State, 435 So. 2d 664, 670 (Miss. 1983)

Voyles v. State, 362 So. 2d 1236, 1244 (Miss. 1978)

*Washington v. State, 361 So. 2d 61, 65 (Miss. 1978)

*Othie Lee West v. State, 485 So. 2d 681 (Miss. 1986)

*Tony Wells West v. State, 463 So. 2d 1048 (Miss. 1985)

Wheat v. State, 420 So. 2d 229, 241 (Miss. 1982)

*White v. State, 532 So. 2d 1207 (Miss. 1988)

Wilcher v. State, 448 So. 2d 927, 940 (Miss. 1984)

Wilcher v. State, 455 So. 2d 727 (Miss. 1984)

*Wiley v. State, 449 So. 2d 756 (Miss. 1984)

*Wiley v. State, 484 So. 2d 339, 352 (Miss. 1986)

Jessie Derrell Williams v. State, No. DP-56 (Miss. October 7, 1987)

Walter Williams, Jr. v. State, 445 So. 2d 798, 815 (Miss. 1984)

*Williamson v. State, 512 So. 2d 868 (Miss. 1987)

Woodward v. State, 533 So. 2d 418, 434 (Miss. 1988)

* The cases marked with '*' denote murders by gunshot wound where death occurred instantly or within a few minutes.

2. Cases where the jury did not find the "especially heinous, atrocious or cruel" aggravating circumstance:

Coleman v. State, 378 So. 2d 640, 648-649 (Miss. 1979)

Arthur Ray Lanier v. State, 450 So. 2d 69 (Miss. 1984)

Pinkton V. State, 481 So. 2d 306, 308 (Miss. 1985)

Tony Wells West v. State, 519 So. 2d 418 (Miss. 1988)

3. Cases where the jury was not instructed to consider the "especially heinous, atrocious, or cruel" aggravating circumstance:

Leo E. Edwards v. State, 413 So. 2d 1007 (Miss. 1982)

Laney V. State, 421 So. 2d 1216 (Miss. 1982)

Mease v. State, 539 So. 2d 1324 (Miss. 1989)